

Minutes of the 82nd meeting of the Board of the EHRC

5 March 2019

Fleetbank House, 2-6 Salisbury Square, London, EC4Y 8JX

Attending:

Commissioners

David Isaac, Chair
Suzanne Baxter
Pavita Cooper
Susan Johnson
Helen Mahy
Mark McLane
June Milligan
Lesley Sawers
Swaran Singh (items 1-11)
Caroline Waters (items 1-9 and 11-12)
Rebecca Hilsenrath, Chief Executive Officer

Officers

Erica Boardman, Senior Associate – Communications (items 1 to 7)
Joe Corcos, Director - People and Infrastructure (items 1 to 7)
Stephanie Davin, Senior Associate – Policy Secretariat (item 10)
Charlie Hamilton, Principal – Policy Secretariat (item 10)
Melanie Field, Executive Director – Strategy and Policy and Wales
Rachel Fox, Senior Associate, Treaty Monitoring (item 9)
Annika Joy, Principal – Strategic and Business Planning (item 7)
Richard Mabbitt, Senior Associate - Corporate Governance
Callum MacInnes, Principal – Corporate Governance
Olufemi Oguntunde, Director - Finance and Procurement
Joanna Owen, Principal – Legal (item 9)
Paola Uccellari, Director – Strategic Planning and Policy

Guest

Hilary Spencer, Director – Government Equalities Office (item 7)

Observing

Catrin Wallace, Senior Associate – Wales
Graham Wheaton, Senior Associate - Corporate Governance

1. Chair's welcome, attendance and apologies for absence

- 1.1 David Isaac welcomed attendees. The meeting had been preceded by a Commissioners-only session reflecting on the outcomes of the joint Board and Committees Strategic Plan Workshop held in Birmingham on 11-12 February 2019.

- 1.2 David Isaac noted that, as approving the use of regulatory powers in circumstances likely to have significant resource and risk implications was a matter reserved for the Board, a special telephone meeting of the Board had taken place on 25 February 2019 to discuss the proposed approach and governance of the anti-Semitism investigation. The Board had discussed and agreed that approval was on this occasion a matter reserved to the Board and would be delegated to the Chair on the understanding that he would keep the Board apprised of developments on a regular basis, and that the Board would be consulted prior to any formal use of the Commission's powers taking place.

2. Apologies for absence

- 2.1 Apologies had been received from Commissioner Alasdair Henderson who had provided feedback on papers relating to items 9, 10 and 11, which David Isaac would relay. Apologies had also been received from Alastair Pringle (ED Scotland, and Corporate Delivery). Joe Corcos and Erica Boardman were standing in for Ben Wilson (ED England, and Corporate Improvement and Impact).

3. Declarations of interest

- 2.1 Helen Mahy reported that from 14 March 2019 she would leave the Board of MedicX Fund Limited and join to the board (as deputy chair and senior independent director) of Primary Health Properties plc when these two companies merged.
- 2.2 No further declarations were made additional to those already registered.

4. Minutes of the last meeting

- 4.1 The minutes of the 81st Board meeting of 16 January 2018 (paper EHRC 82.01) were agreed as a true record subject to amendment of paragraph 6.2 (c) to read "...the Commission's draft 'If not EU then Who?' research report which noted significant potential funding losses in Wales and Scotland following Brexit."

5. Actions arising

- 5.1 The Board reviewed the log of actions arising from Board meetings (EHRC 82.02).
- 5.2 On action 81/4.2 (Board effectiveness) the Board noted that Helen Mahy had fed into the specification for Board management software and the tender process was now open. The Board emphasised the importance of a quality solution offering long-term value for money rather than a lowest upfront cost option, and asked officers to seek an expedited delivery. Helen Mahy emphasised the need for full Board and executive buy-in to the chosen solution to assure its effectiveness.

- 5.3 On Action 81/5.7 (people Survey) Joe Corcos reported that the survey results had been generally positive and a summary report would be circulated later in the month to Board members with discussion scheduled at the Human Resources and Remuneration committee of 17 April 2019.
- 5.4 Board members asked officers to correct the transposition error in Action 81/11.4 to refer to Accessible Websites Regulations work rather than 'Working Forward'.
- 5.5 The Board additionally noted that the draft report of Campbell Tickell's review of Statutory Committee effectiveness would be shared with the Board when it had been finalised with Committees. **Action: Callum MacInnes.**

6. CEO's update

- 6.1 Rebecca Hilsenrath gave an overview of current priority work areas
- 6.2 The Board noted the update (at paper EHRC 82.04) on next steps for the Commission's guidance for schools relating to pupils with the protected characteristic of gender reassignment, on which some Commissioners had been already updated at a telephone meeting of 4 February 2019.
- 6.3 Commissioners reviewed the Period 10 Finance and Performance report (EHRC 82.03). Commissioners discussed the forecast underspend of £689K. Commissioners were disappointed that notwithstanding the mechanisms put in place to eliminate any underspend the projected amount fell outside the tolerances set at the outset of the financial year, both in terms of the opportunity cost and the reputational and financial sustainability risks this potentially presented.
- 6.4 Commissioners did acknowledge the intrinsic challenge of attaining a near-zero underspend (especially government accounting rules relating to programme and administrative spend), and the serious consequences of going even marginally over-budget. Commissioners also recognised the improvements that had taken place in terms of financial reporting and management information. However, they felt the Commission needed to improve the robustness and rigour of its budget management, including holding budget holders more effectively and regularly to account for the deliverables against budgets, and improving visibility for executive directors through their respective management lines. Commissioners asked that the Commission take stock of its approach to regular reviews and accountability and incentivisation including the effectiveness of Delivery Group and Prioritisation Group and the overall financial skills sets of budget holders. Commissioners suggested that performance review should include regular dialogue and review of progress against objectives and financial spend.
Action: Rebecca Hilsenrath and EDs
- 6.5 The Board was disappointed that the EHRC's application for a £250K 2018/19 and 2019/20 Budget exchange had not been approved by HM Treasury, and

noted that the complex sponsor arrangements for the Commission had delayed the application process.

- 6.6 The Board asked for further reassurance on delivery projections (EHRC 62.03 Annex A) given the number of projects with expected end dates at the very end of the financial year. **Action: Alastair Pringle** to provide updated information on the number of projects that had been completed by the end of February and the number that were expected to be complete by the end of March.
- 6.7 The Board discussed a request from GEO for support from the Commission's Administrative budget underspend to the Government Equalities Office (EHRC 62.03 Annex C refers). Commissioners noted that Audit and Risk Assurance Committee (ARAC) had deliberated extensively on this request and Susan Johnson had received assurances from NAO and HM Treasury that to do so was not unethical, novel or contentious. To do so would not be regarded by Government as setting a precedent, nor would it affect any future spending review settlement. The request – which GEO had made clear that the Commission was at liberty to decline – did not materially impact upon the Commission's freedom to act as an independent NHRI. ARAC had therefore concluded that, subject to Board discussions, EHRC could release £200K to GEO. Given the assurances EHRC had received from NAO and HM Treasury, the Board agreed that EHRC should release this sum to GEO once the Chair had satisfied himself on all these assurances in a meeting shortly to be held with senior finance representatives of DfID. **Action: Olufemi Oguntunde and David Isaac**

7. Committee Chairs' Updates.

- 7.1 The Scotland, Wales and Disability Advisory Committees (DAC) had attended a joint Strategic Plan workshop with the Board on 11-12 February, and feedback from all Committees had been incorporated into the papers at EHRC 82.06. The Board noted that the Scotland Committee had met on 26 February; the Wales Committee had met on 26 and 27 February and the DAC on 5 February. On the subject of assisted dying, feedback from earlier drafts of paper EHRC 82.07 from Scotland Committee and DAC had been incorporated into this paper (to be discussed at item 9), and an addendum had been tabled summarising views from the Wales Committee.
- 7.2 The Commissioner Working Group on Treaty Monitoring had met on 28 February and had asked the Board to consider paper EHRC 82.09 on the Minimum age of Criminal Responsibility (to be discussed at Item 11).
- 7.3 Audit and Risk Assurance Committee (ARAC) had met on 6 February and by telephone on 25 February. HRRC had held its first meeting under new membership on 16 January 2019.

- 7.4 The Board agreed revised Terms of Reference for the Audit and Risk Assurance Committee as set out at paper EHRC 62.05.
- 7.5 Minutes of recent Committee meetings continued to be circulated upon clearance by Chairs rather than at meetings.

8. Strategic Plan and Business Plan

- 8.1 Paola Uccellari and Annika Joy introduced Paper EHRC 82.06 which set out the draft Strategic Plan for final comments and agreement. It proposed delegation of sign-off on the Business Plan 2019/20 to the Chief Executive and Chair of the Board, an outline Business Plan having been circulated before the meeting.
- 8.2 Overall the Board was pleased with the approved Strategic Plan. The Board was happy that it and Committees had been given adequate opportunity to input to its development, and that their feedback (as summarised in the paper) had been duly considered. They were content that the Plan as it stood took reflected the evidence set out in 'Is Britain Fairer?' and elsewhere, and the views expressed in an extensive consultation exercise, and that it addressed the recommendations set out in the Tailored Review report.
- 8.3 However, the Board was disappointed that it had not been possible to present a fully worked-up Business Plan so that the Business Plan and Strategic plan could be considered together. Without knowledge of the operationalisation of the Strategic Plan, the Board felt unable formally to approve the Strategic plan at this time. However given the statutory duty to lay the Plan before Parliament and the timeline for publication (including translation) the Board was content for the preparation of a finalised Strategic Plan document to continue, so that it was in a 'ready to issue' state at a subsequent point of approval. **Action: Annika Joy and Eric Boardman** to progress.
- 8.4 The Board also felt that it should sign off the Business Plan collectively rather than delegating sign-off to the Chief Executive and Chair. Mark McLane agreed to work with officers to finalise the draft Business Plan prior to full Board approval. This approval would be by a special Board telephone meeting to be arranged for the week commencing 18 March. The Board asked additionally for the following points to be incorporated. **Action: Paola Uccellari, Laura Lucking, Femi Oguntunde** to work with **Mark McLane** on revised draft and set up a special Board meeting for approval.
- 8.5 Subject to the resolution of the issues above the Board was content with the overall presentation of the 'plan on a page' EHRC 82.06 Annex 2, and felt that this would be a helpful addendum to the Strategic Plan. The Board asked for pay gaps to be referenced explicitly on the page. **Action: Paola Uccellari**
- 8.6 The Board was content with the format of the Strategic Risk Register at EHRC 82.06 Annex 3 which would come into operation alongside the strategic plan. The Board noted ARAC's full engagement in shaping the risk register and

looked forward to discussing this in more detail at the Board meeting of 22 May 2019.

9. Independent Living

- 9.1 Rachel Fox and Joanna Owen introduced paper EHRC 82.08 on strengthening domestic protection of the right to independent living. Board members noted the current serious shortfalls in the UK's compliance with its duties under Article 19 of the UN Convention on the Rights of Persons with Disabilities (UNCPRD) to ensure that disabled people enjoy their right to live independently in the community. Cases of people with learning disabilities and autism unable to move from secure inpatient units into community living, and the restrictions placed by Clinical Commissioning Groups in England on the cost of Continuing Health Care were cited as examples.
- 9.2 Board members discussed proposals for strengthening the right to independent living in domestic law, as follows:
- a) A positive duty on public bodies to have due regard to ensuring they embed compliance with article 19 into all relevant policies and services.
 - b) A qualified presumption in favour of providing accommodation in the community subject to a disabled person's wishes.
 - c) A duty on local and national government to record and monitor the gap between individuals' real independent living needs and current provision, and to make progress towards closing this gap.
 - d) An overall principle placing primacy on the views of disabled people.
 - e) Provisions placing restrictions (according to clear criteria) on the opening of further institutional accommodation.
 - f) Improved arrangements for disabled people to appeal decisions and seek redress.
- 9.3 The Board noted support for these proposals from the Disability Advisory Committee, and from key external stakeholders.
- 9.4 The Board supported these measures in principle. It agreed that they should be taken forward as set out in the paper as part of the Commission's wider programme of stepwise work to incorporate UN treaties into domestic legislation. This would include the Commission's response to the forthcoming Social Care Green Paper, the Mental Health Act review, and ongoing discussions with the Department for Health and Social Care.
- 9.5 Board members additionally:
- a) asked that potential strategic opportunities that exist in Wales were explored fully in taking the work forward.
 - b) emphasised that this was both a health and a social care issue, and any influencing work needs to articulate this clearly and holistically, with due consideration for where budgets and responsibilities lay.

- c) agreed that – subject to advice from counsel, and consideration by executive group – it would support a duty stronger than the due regard currently proposed.

Action: Rachel Fox to take forward, incorporating Board feedback, and providing a progress update to the Board.

10. Assisted Dying

- 10.1 Charlie Hamilton introduced paper EHRC 82:08 on assisted dying.
- 10.2 Board members acknowledged that the issue was complex and stakeholder opinion strongly divided. They noted that human rights arguments could be made for positions supporting assisted dying or opposing it. They noted that a range of views had been expressed by Scotland, Wales and Disability Advisory committees and that no clear consensus had emerged. There were strong and impassioned arguments on all sides from key stakeholders.
- 10.3 The Board noted the view that a policy position that supported a change in legislation to allow terminally ill people to access assisted dying (with stringent legal conditions and service provision conditions to ensure that such a change would have a positive impact on rights, and avoid placing people at risk) would not necessarily be discordant with key human rights principles. These included the right to a private life (protected by ECHR Article 8, protecting bodily autonomy and a person's right to make decisions about their life and their medical treatment) and the right to freedom from inhuman or degrading treatment (ECHR Article 3, protecting people against avoidable significant suffering including in health and care settings).
- 10.4 The Board also noted the principled arguments against assisted dying made by key stakeholders, particularly among faith groups and disabled people's organisations.
- 10.5 The Board felt that the Commission's capacity to add impetus and direction to the debate on assisted dying through its human rights and equality mandate was, however, limited as the human rights and equality arguments in relation to assisted dying had already been well rehearsed in the Courts and in Parliament.
- 10.6 The Board noted the implications of changing its position from one of neutrality in terms of the Commission's remit, role and impact, and the need to make difficult prioritisation decisions in delivering against other strategic plan priorities. The Board acknowledged that a more active approach on assisted dying did not fit clearly into the priorities agreed for the Strategic Plan 2019-22, although in principle it could be addressed as a 'balance of rights' issue in the context of an 'egregious breach' legal case or where legislation were proposed and it was decided (having undergone a prioritisation exercise) to undertake new work to influence it.

- 10.7 The Board did not reach a consensus on a new approach, either to support in principle a right to assisted dying for terminally ill people (while setting out the legal conditions and services that need to be in place to protect people's rights in the event of legislative change), or to oppose legislative change. It felt that a simple majority vote on the issue was in appropriate given the importance of this issue.
- 10.8 The Board supported an approach of seeking to illuminate and inform the human rights debate around specific assisted dying cases or legislative proposals, should future opportunities arise.
- 10.9 In order to establish such an approach, the Board asked the Commission, in the light of past cases, to develop a legal framework summarising the current state of the law, which would help future decision making on where we might engage (in a future legal case or proposal for legislative change).
- 10.10 David Isaac thanked Commissioners for their contributions and asked officers to take forward the Board's suggestions. **Action: Charlie Hamilton**

11. Minimum age of Criminal Responsibility (MACR)

- 11.1 June Milligan, as chair of the Commissioner Working Group (CWG) on Treaty Monitoring, reported that the CWG had discussed an earlier version of the paper here presented as [EHRC 82.09](#). The CWG had supported a proposal that the Commission amend its position on the MACR ahead of the Committee Against Torture (CAT) examination of the UK Government in May 2019. The CWG had, however, asked for Board review and agreement of this proposal.
- 11.2 Carla Garnelas briefed the Board further. It was proposed to recommend in the shadow report to the CAT that the UK Government:
- a) develop a holistic, therapeutic and welfare-based system for dealing with the harmful behaviour of children in order to raise the MACR to at least 14 years, in line with international human rights standards;
 - b) ensure there are robust due process protections in place where Children need to be detained within this system, because they are at risk to themselves or others.
- 11.3 Board members discussed and agreed with the recommendation as drafted.
- 11.4 The Board acknowledged that age was an imperfect proxy for development and maturity, but felt on balance that 14 was a reasonable minimum. The Board highlighted the importance of robust protections within social care. Without improvements here raising the MALR risked adverse consequences given that protections afforded by the criminal justice system would no longer apply.
- 11.5 In communicating the Commission's position on the MALR more widely, the Board emphasised the need for a well-argued and persuasive narrative that

took on board the range of public perceptions around the age of criminal responsibility, for example in respect of knife crime by young people.

- 11.6 David Isaac thanked Commissioners for their contributions and asked officers to proceed in line with the Boards decision. **Action: Carla Garnelas**

12. Any Other Business

- 12.1 The Board reflected on the circumstances of the revocation of citizenship of Shemima Begum and asked officers to carry out further research into the background and facts of the case, in order to help determine what the Commission's position might be and consider potential implications for related work carried out by the Commission. **Action: Carla Garnelas to liaise with relevant colleagues**
- 12.2 With no other items of business being raised David Isaac thanked attendees and closed the meeting. The Board would next meeting on 22 May 2019.